

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs February 20, 2007

**STATE OF TENNESSEE v. LARRY FRAZIER**

**Appeal from the Criminal Court for Sullivan County**  
**No. S48, 982     Phyllis H. Miller, Judge**

---

**No. E2006-00955-CCA-R3-CD - Filed May 31, 2007**

---

The Defendant, Larry Frazier, was charged by presentment from a Sullivan County grand jury with violating an habitual traffic offender order, driving under the influence (ninth offense), and reckless aggravated assault arising from an automobile collision. Following a jury trial, the Defendant was convicted of violating the habitual traffic offender order, driving under the influence (sixth offense), and reckless aggravated assault. The Defendant was sentenced as a Range II, multiple offender to serve consecutive sentences, with an effective sentence of sixteen years in the Department of Correction. The Defendant filed a timely motion for a new trial, which was denied. On appeal, the Defendant argues that (1) the identification evidence was insufficient to support his convictions beyond a reasonable doubt, (2) the trial court erred in ordering his sentences to be served consecutively, (3) the trial court erred in sentencing the Defendant to the maximum sentence for each of his three convictions, (4) the trial court erred in denying the Defendant's motion to waive all or part of his fines, and (5) the trial court erred in denying the Defendant probation or other alternative sentencing. Finding no reversible error, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Leslie S. Hale, Blountville, Tennessee, for the appellant, Larry Frazier.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall Nichols, District Attorney General; and Brandon Haren, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

This case arises from an automobile collision in Sullivan County on August 2, 2003. Officer Burt Murray of the Kingsport Police Department arrived at the scene of the accident approximately seven minutes after it occurred. He observed that “two vehicles . . . had been involved in the collision, one of which was a Ford Crown Victoria, had heavy damage to the front of it. The other vehicle was a blue 2001 Lincoln Continental; it had heavy damage to the left front of it.” Officer Murray inspected the scene and determined that the Defendant’s vehicle was responsible for the collision. Officer Murray went to the vehicle of the victim, who was an elderly gentleman, and observed that he was “slow moving getting out of the car and leaning up against the car. He was checking a bandage that was on the left side of his chest from a previous injury or some sort of treatment.” Officer Murray stated that he could “see blood through that bandage.” It was later determined that the victim had a recent surgical scar that was re-injured in the collision.

Officer Murray also went to the Defendant’s car and found him “laying across the front seat of [his car,] the Ford Crown Victoria.” The Defendant was being treated by medical personnel. Officer Murray testified that “the first indication . . . that there was some kind of intoxicant [involved was that the Defendant’s] speech was slurred.” Officer Murray stated that, as he “got closer to him[.]” he could “smell the odor of alcohol coming out of the car.” Officer Murray asked the Defendant what happened, and he responded, “I wasn’t driving.”

Officer Murray again asked the Defendant about the details of the collision, and he again replied that he was not driving the vehicle that struck the victim. Officer Murray testified that, “[w]hen I asked him who was driving[,] he gave me a description of a young guy with long hair, no T-shirt and gave me a first name and that was all he knew.” However, Officer Murray testified that neither he nor any emergency medical personnel saw anyone else at the scene who may have been driving this vehicle.

Officer Murray also testified regarding the physical evidence at the scene that demonstrated the Defendant was in fact driving the vehicle. He stated that he saw no blood in the car other than on the driver’s air bag, and the Defendant was bleeding heavily from his face. Additionally, the Defendant had red burn marks that were consistent with the injury inflicted when an air bag deploys. Therefore, Officer Murray testified that he found no evidence at the scene to indicate that another individual was driving the vehicle that struck the victim. Following the on-scene investigation, Officer Murray had the Defendant’s blood tested for his blood alcohol level, and the results showed the level was “[p]oint 23.”

Officer Murray stated that he checked the Defendant’s “license status[.]” as was standard protocol, and discovered that his license was “revoked” and that the Defendant was a “habitual traffic offender.” The order declaring the Defendant to be a habitual traffic offender was introduced into evidence at the Defendant’s trial, and the parties stipulated to the admission of the order.

Mr. Todd Bailey witnessed the collision and testified at trial about the incident:

[The victim] was right in front of me and the light was red and then it turned green and [the victim] began to pull out and another vehicle came, moving at a pretty good rate of speed down through here and hit [the victim] and the vehicle . . . bounced off

[the victim's] and went up over . . . an embankment . . . and it knocked [the victim's car and] . . . spun him all the way around.

Mr. Bailey reiterated that he was "[p]ositive" that the light turned green before the victim entered the intersection. He testified that he "only saw one person" in the Defendant's car and that the person was "[i]n the driver's seat." Mr. Bailey testified that he did not see any person exit the Defendant's vehicle or flee that area.

The victim, Mr. Ted Williamson Hagan, also testified regarding the accident:

I came off the intersection . . . and coming down toward the boulevard the traffic light was red. I came to a stop. I took a look to the left and the right and there was a car coming from the right. And the light changed to green but I was concerned about the car from the right. And it did come to a stop so when it did I pulled out into the intersection and the next thing I know [sic] I was over in the yard area to the right and couldn't stop the car because the brakes were gone and a fence stopped me.

The victim testified that he did not see the Defendant's car before it hit him and that, therefore, he could not "identify" the Defendant as the driver of the vehicle.

In his defense, the Defendant testified that he was "[p]ositive" that he was not driving the white Crown Victoria that struck the victim. The Defendant stated that he did not own this car nor was the car registered to him. He stated that, on the day in question, "[t]his boy pulled up [to my house.] He asked me did I know where a guy friend of mine lived, he said his name was Jessie [Dennison]." The Defendant further stated that this boy "asked me would I ride up there with him, it wouldn't take five minutes and I said yeah. I rode up there and on the way back that was when it happened." He said that it had been "10 or 15 years" since he had seen this boy, and he did not know his name and could no longer identify him. He admitted that he told Officer Murray that the driver was a "long-haired shirtless man" but that he was not "sure" about that description. The Defendant also admitted that he had told Officer Murray a possible name of the boy driving but that he could not remember that name now and was not certain it was correct. The Defendant stated that he "forgot" why this boy wanted to see Jessie Dennison. When asked why the Defendant got into this vehicle, he stated, "I was drinking; I'd do anything crazy."

The Defendant also recounted his version of the accident: "We was [sic] coming down through there and it looked like to me that [the boy driving the vehicle he was in] ran the red light . . . . I don't know, it looked like the light was yellow. He was trying to beat that yellow light and that's when he hit him." The Defendant testified that, after the collision, the boy that was driving

the car “jumped out and run [sic].” The Defendant stated that he “saw him running but . . . didn’t know which way he went.” He further said that he “didn’t pay no [sic] attention” to which way the boy ran.

Following the trial, the jury convicted the Defendant of violation of a habitual traffic offender order, driving under the influence (sixth offense), and reckless aggravated assault. The Defendant was sentenced as a Range II, multiple offender to the maximum on each count—four years for the violation of the habitual traffic offender order, four years for the DUI sixth, and eight years for the reckless aggravated assault. The Defendant’s effective sentence was sixteen years in the Department of Correction. The jury also recommended a fine of \$3000 on the violation of the habitual traffic offender order and a fine of \$3500 for the reckless aggravated assault, which the court imposed.

## **Analysis**

### **I. Sufficiency of the Evidence**

The Defendant’s first issue is whether the evidence of his identification as the driver of the vehicle is sufficient to support his conviction beyond a reasonable doubt. Specifically, the Defendant asserts that he was not driving the vehicle that struck the victim and that the State did not prove that he was the driver beyond a reasonable doubt. The State responds that, although there is no conclusive proof that the Defendant was driving, that “there was sufficient evidence presented on which the jury could accept and conclude that [the Defendant] was the driver of the vehicle.” We agree with the State.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d

at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Although the Defendant testified that he was not driving the vehicle at the time of the collision, a reasonable jury could have concluded beyond a reasonable doubt that the Defendant was in fact the driver of the car that struck the victim. Officer Murray, a traffic officer who investigates “serious collisions involving death, serious injury or intoxication[,]” testified that he found no evidence that any other person was driving the vehicle in question. Officer Murray also testified that the Defendant was bleeding from his face and that the only blood in the car was on the driver’s air bag. Officer Murray stated that the Defendant also had burn marks that were consistent with the injuries inflicted when an airbag deploys, which would also place the Defendant in the driver’s seat. Officer Murray testified that, although he was not at the scene when the accident occurred, he was not aware of anyone who saw another person fleeing the area. Additionally, Mr. Bailey, the eyewitness to the accident, also testified that he only saw one person in the vehicle in question and that he did not see anyone leaving the scene of the accident.

Therefore, the only evidence before the jury that another person may have been driving the vehicle in question was the Defendant’s own testimony. The Defendant’s version of events was that a person that he had known several years ago arrived at his house, found him to be outside, and asked him to ride in his vehicle to the residence of the Defendant’s friend, Jessie Dennison. During this trip, the driver struck the victim’s car. The Defendant testified that he thought he may have recalled the driver’s name and told that name to Officer Murray but that he no longer recalled the name. The Defendant described that man as only a “long-haired shirtless man” but stated that he could not even be “sure” if that description was correct. The Defendant further explained why he got into this vehicle, testifying that “I was drinking; I’d do anything crazy.”

Based upon the evidence presented at trial, a reasonable juror could conclude beyond a reasonable doubt that the Defendant was driving the vehicle. Although the Defendant presented an alternate version of events, the jury is permitted to discredit the Defendant’s assertions and to accredit the testimony of Officer Murray and the accident eyewitness, Mr. Bailey. The verdict demonstrates that the jury elected to do precisely that. As such, the Defendant has failed on appeal to carry his burden of demonstrating that the evidence was insufficient. Therefore, we conclude that the evidence is sufficient to support the Defendant’s convictions beyond a reasonable doubt.

## **II. Sentencing**

Next, the Defendant asserts that the trial court erroneously sentenced him. Specifically, the Defendant contends that (1) the trial court erred by imposing the maximum sentence within his range, (2) the trial court erred by running the sentences consecutively, (3) the trial court erred by denying him probation or another form of alternative sentencing, and (4) the trial court erred by not waiving all or part of his fines.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the

principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b);<sup>1</sup> State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

#### ***A. Length of Sentence***

First, the Defendant alleges that the trial court erred by imposing the maximum sentence within his range for all three convictions. The trial court first determined the Defendant was a Range II, multiple offender, which the Defendant does not challenge on appeal. The trial court determined that the ranges for the offenses were four to eight years for the reckless aggravated assault (Class D felony) and two to four years for both the sixth offense of driving under the influence and the violation of the habitual traffic offender order (each a Class E felony). The trial court then determined that the Defendant deserved the maximum within each range because of his previous history of criminal convictions, his history of unwillingness to comply with the conditions of a sentence involving release into the community, and his lack of hesitation about committing a crime when the risk to human life is high. See Tenn. Code Ann. 40-35-114(b)(2), (9), (11) (2003). The trial court found no mitigating factors.

Our law dictates that the “presumptive sentence for a Class B, C, D, and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors.” Tenn. Code

---

<sup>1</sup> We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. See Tenn. Pub. Acts ch. 353, § 22. However, the Defendant's crimes in this case predate the effective date of these amendments. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

Ann. § 40-35-210(c) (2003). “Should there be enhancement factors but no mitigating factors for a Class B, C, D, and E felony, then the court may set the sentence above the minimum in that range but still within the range.” Tenn. Code Ann. § 40-35-210(d) (2003). “The weight to be afforded an existing factor is left to the trial court’s discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record.” State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995) (citing Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)).

### ***1. No Hesitation to Commit Crime Where Risk to Human Life was High***

The Defendant contends that the trial court incorrectly determined that he had no hesitation about committing a crime where the risk to human life was high. See Tenn. Code Ann. § 40-35-114(11) (2003). Relying upon State v. Imfeld, 70 S.W.3d 698 (Tenn. 2002), and State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001), the Defendant states that simply because another motorist, Mr. Todd Bailey, was near the scene when the collision occurred does not provide sufficient grounds to support the application of this factor. The Defendant’s reliance on these cases is misplaced.

In Imfeld, the Tennessee Supreme Court did not consider the enhancement factor applied in this case, see Tenn. Code Ann. § 40-35-114(10) (1997), but instead was analyzing the multiple victim enhancement factor, see Tenn. Code Ann. § 40-35-114(3) (1997), and the potential for bodily injury factor, see Tenn. Code Ann. § 40-35-114(16) (1997).<sup>2</sup> Furthermore, our Court found that the enhancement factor of having no hesitation about committing a crime where the risk to human life was high was properly applied in the Imfeld case, which also involved an intoxicated driver who struck and injured several occupants of a vehicle. See State v. Sean Imfeld, No. E2000-00094-CCA-R3-CD, 2001 WL 185195, at \*4 (Tenn. Crim. App., Knoxville, Feb. 27, 2001). Our Court held that, while this factor “generally cannot be attached to the offense of aggravated assault, [it] may be applied when persons other than the victim are nearby and might be subject to injury.” Id. (citing State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995)).

This Court reaffirmed the same holding in State v. Dean, in which we stated that Tennessee Code Annotated section 40-35-114(10) (1998) could be used “when the defendant endangers the lives of people other than the victim.” Dean, 76 S.W.3d at 381. The trial court found that Mr. Todd Bailey, who was driving behind the victim when the accident occurred, was near the collision site and could very well have been injured by the Defendant’s reckless driving and driving under the

---

<sup>2</sup> We note that Tennessee Code Annotated section 40-35-114 was amended to be effective on July 4, 2002. The 2002 amendments renumbered the enhancement factors to include as 40-35-114(1) an enhancement if the offense “was an act of terrorism or was related to an act of terrorism.” Tenn. Code. Ann. 40-35-114(1) (2002); see also 2002 Tenn. Pub. Acts ch. 849, §2(c).

The Defendant’s sentence was enhanced by the trial court based upon factors 40-35-114(2), (9), and (11) as numbered in 2002. These same enhancement factors were numbered 40-35-114(1), (8), and (10) before July 4, 2002, and after June 7, 2005. The Imfeld and Dean courts refer to the pre-2002 numbering because those offenses occurred in 1997 and 1998 respectively.

influence. Thus, Tennessee Code Annotated section 40-35-114(11) (2003) is applicable in this case to allow the trial court to enhance the Defendant's sentence.

## ***2. Unwillingness to Comply with Sentences Involving Release***

We note that the Defendant did not challenge the second factor which the trial court used to enhance his sentence, which was that he had a history of unwillingness to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(9) (2003). The trial court documented the Defendant's unwillingness to comply with such prior sentences involving release.<sup>3</sup> Because the Defendant does not challenge this determination and we find no error in the trial court's analysis, we conclude that the Defendant's failures to comply with sentences involving release into the community supports the enhancement of his sentence.

## ***3. Prior Criminal Record***

The Defendant also does not challenge the trial court's enhancement of his sentence based on his history of criminal convictions or criminal behavior in addition to those convictions necessary to establish his Range II sentencing classification. See Tenn. Code Ann. § 40-35-114(b)(2) (2003). We conclude that the record supports enhancing the Defendant's sentence to the maximum within each range based solely upon his history of prior criminal convictions. The presentence report contains nine pages devoted to the Defendant's prior criminal history. With respect to this factor, the trial court found as follows:

---

<sup>3</sup> The trial court determined that this factor applied based upon the facts of his prior sentences involving release into the community, as follows:

Let's see, violation of probation in [1997] . . . and on April 13th of [1999] found to have violated his probation, continued on probation after service of 30 days. . . . Extended the probation for 11 months 29 days. Second violation was filed in those cases on April 10th, 2000. June 15th, 2000 probation was revoked and ordered to serve his sentence. Violation warrant issued in Washington County Criminal Court . . . on November 24th, [1999]. . . . January 31st, [1975] he got six months suspended on a driver's license violation . . . and while he was on that suspended sentence March 24th[, 1975] he got charged with attempted burglary and was convicted of attempted burglary[.]

. . . .

. . . February 24th[, 1977], 11/29 suspended. March 17th[, 1977], while he was on that probation a public intoxication. Then, let's see, didn't violate that one. . . . September 27th[, 1993] six months all suspended but 48 hours and then November 6th[, 1993] a driving on revoked and a [DUI], convicted of those. And on May 31st, [1994,] got 11/29 suspended; got a public intoxication September 5th[, 1994]. Had a DUI conviction November 15th of [1995], 11/29 all suspended but 120 days. Pled to another DUI on that same date, 11/29 all suspended but 120 days. The next set is [1997]—actually pled to three, three 11/29s, three DUIs. August 27<sup>th</sup>[, 1998], one year in the Tennessee Department of Corrections. You got a two year—suspended to community corrections . . . Well, let's see, then November 3rd[, 1999,] he would have still [been] on that sentence, that release in the community. Committed an evading arrest, felony evading arrest, DUI 4th offense. [On] November 3rd[, 1999]. Violation of habitual traffic offender order. I find that enhancement factor [under Tennessee Code Annotated section 40-35-114(9) (2003)] applies. I give it great weight.

[Y]ou have a [previous] history of criminal convictions and in addition to those necessary to establish the appropriate range. His criminal history is set out in the presentence report and goes from page, from the top of page 8 to the top of page 17. Started drinking at age 10, that's criminal behavior, or the intent, but still drinks, let's see, he was around people drinking all of his life and he started drinking as well and he drinks until he gets drunk. Never received any treatment for his alcoholism. Denies that he uses illegal drugs. Well, the criminal behavior would be the drinking if he started at ten he was still drinking under age when he was an adult, I mean as far as 18 years of age goes.

In other portions of the sentencing hearing, while considering other factors related to the Defendant's sentence, the trial court also referred to the Defendant's criminal behavior as "astounding." The sentencing transcript demonstrates that the Defendant had "been in court since the 70's, 1971 it starts, age 19, you're now 52." The trial court also found that the Defendant had "at least 12 and possibly—this is at least your 12th and possibly your 13th conviction for DUI. You've got a felony evading arrest. . . . [Several convictions for] driving on a revoked license . . . . Public intoxication scattered out on almost every page. Driving on a suspended license. Reckless driving. Resisting arrest. Assault."

Based upon our de novo review of the sentence, we conclude that the trial court had sufficient grounds to enhance the Defendant's sentence to the maximum on each charge based solely upon this criminal history. The trial court sentenced the Defendant as a Range II, multiple offender. Pursuant to Tennessee Code Annotated section 40-35-106, a "multiple offender" is a defendant who has received. . . [a] minimum of two (2) but no more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable . . . ." Tenn. Code Ann. § 40-35-106(a)(1). The presentence report reflects that the Defendant was classified in this range because of his prior convictions for a sixth offense of driving under the influence and two violations of an habitual traffic offender order, all of which were Class E felonies.

Any additional prior criminal convictions aside from those necessary to define the range could be relied upon to enhance the Defendant's sentence. See Tenn. Code Ann. § 40-35-114(2) (2003). By examining the presentence report, which was included in the record on appeal, we conclude that the Defendant had numerous convictions beyond those necessary to establish the range which would allow the trial court to enhance the sentence. Our tally of the Defendant's convictions based upon the presentence report includes nine public intoxication convictions, six convictions for driving on a revoked license, one conviction for driving on a suspended license, one felony evading arrest, one misdemeanor evading arrest, one misdemeanor resisting arrest, one assault, one attempted burglary, one reckless driving charge, one driving without a license conviction, two violations of the drivers' license law, two violations of the open container law, one disorderly conduct conviction, and eight traffic offenses including speeding, two violations of the drivers' registration law, an improper turn, and illegal parking.

#### **4. Implications of *Blakely* and *Gomez***

While not argued by the Defendant, we will briefly address the Defendant's sentence in light

of the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296 (2004). In Blakely, the high court struck down a provision of the Washington state sentencing guidelines, quite similar to the one in Tennessee, that permitted the trial judge to impose an "exceptional sentence" after the court made a post-trial determination that certain statutory enhancement factors existed. The Supreme Court determined that, other than upon the basis of a defendant's prior convictions, the protections in the Sixth Amendment to the federal constitution allow a defendant's sentence to be increased by the trial court only where the enhancement factors are based on facts reflected in the jury verdict or admitted by the defendant. See id. at 303. The Blakely decision called into question the validity of Tennessee's sentencing statutes, insofar as they permitted trial courts to increase a defendant's presumptive sentence based upon enhancement factors found by a trial judge as opposed to findings made by a jury.

Thereafter, the Tennessee Supreme Court held that Tennessee's sentencing laws did not violate the dictates of Blakely. See State v. Gomez, 163 S.W.3d 632 (Tenn. 2005). The United States Supreme Court recently vacated the judgment in Gomez and remanded that case to the Tennessee Supreme Court for further consideration in light of Cunningham v. California, 549 U.S. --, 127 S. Ct. 856 (2007). See Gomez v. Tennessee, 127 S.Ct. 1209 (2007). Therefore, the validity of Tennessee's former sentencing statutes, under which the Defendant was sentenced, are again called into question.<sup>4</sup>

Here, the trial court relied heavily on the Defendant's record of prior criminal convictions in determining that the maximum sentence in the Defendant's range was appropriate. Because of that extensive and lengthy record, we have determined that any error by the trial court in finding the existence of the additional two enhancement factors is harmless beyond a reasonable doubt.

### ***B. Consecutive Sentencing***

Next, the Defendant asserts that the trial court erred by ordering that the sentences be served consecutively. "Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. James, 688 S.W.2d 463, 465 (1984). Under Tennessee Code Annotated section 40-35-115, the trial court "may order sentences to run consecutively if the court finds by a preponderance of the evidence that" any of the applicable statutory factors apply. Tenn. Code Ann. § 40-35-115(b). Consecutive sentencing must also follow the general sentencing principles, requiring that the overall sentence "should be no greater than that deserved for the offense committed" and "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. . . ." Tenn. Code Ann. § 40-35-103.

At the sentencing hearing, the trial court found as follows:

Now, should your sentences be consecutive or concurrent[?] Let's see, the [c]ourt can consider the same facts and circumstances both to enhance sentences and

---

<sup>4</sup> We again note that the legislature amended our sentencing statutes effective June 7, 2005, in response to the Blakely decision. See 2005 Tenn. Pub. Acts ch. 353.

impose consecutive sentences.

Now, . . . mandatory consecutive sentencing doesn't apply. We'll just cut through that right away. Discretionary consecutive sentencing, the [c]ourt may order consecutive sentences if the [c]ourt finds by a preponderance of the evidence that the [D]efendant is a professional criminal who has knowingly devoted his life to criminal acts as a major source of livelihood. [Under Tennessee Code Annotated section 40-35-115(b)(2),] I find beyond a reasonable doubt that [the Defendant has] an extensive record of criminal activity. That's all I'm required to find is one of these and I find that one.

Also, I find [under Tennessee Code Annotated section 40-35-115(b)(4)], the [D]efendant is a dangerous offender whose behavior evidences little or no regard for human life and no hesitation about committing [crimes] . . . where risk to human life is high. So I find that beyond a reasonable doubt. Now, I find that consecutive sentences are necessary and the least severe measure necessary to protect the public from your future criminal conduct. I find that you have little or no potential for rehabilitation. You've been in court since the 70's, 1971 it starts, age 19, you're now 52. It's almost—I mean I don't know where you were, probably . . . in jail during the years that you didn't commit any crimes. And you're right, the majority of them are crimes that pose a danger to the community. You've got two convictions for violation of habitual traffic offender order. You've got at least 12 and possibly—this is at least your 12th and possibly your 13th conviction for DUI. You've got a felony evading arrest. Let's see here, [several convictions for] driving on a revoked license . . . . Public intoxication scattered out on almost every page. Driving on a suspended license. Reckless driving. Resisting arrest. Assault. So, yes, I find that they're necessary to protect the public from your future criminal conduct. I find you have no potential for rehabilitation. You don't take responsibility for your actions.

The trial court then imposed consecutive sentencing of the three convictions for an effective sentence of sixteen years in the Department of Correction.

We conclude that the trial court did not err in imposing consecutive sentences. The trial court properly considered the applicable statutory factors for consecutive sentencing and stated on the record the reasons for imposing consecutive sentences. The Defendant's lengthy history of criminal convictions supports the trial court's findings that the Defendant has an extensive criminal record, that he has little or no regard for human life, and that he has no hesitation about committing crimes where the risk to human life is high. His record demonstrates that consecutive sentences are necessary in order to protect the public from further criminal acts. See State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). Therefore, because the trial court properly followed the statutory procedure set forth in our 1989 sentencing guidelines and properly found factors applicable to impose consecutive sentencing, we conclude that the trial court did not err.

### ***C. Denial of Probation or Alternative Sentencing***

Next, the Defendant asserts that the trial court erred in denying him probation or another form of alternative sentencing. At the time the Defendant committed his crimes, a defendant was eligible for probation if the actual sentence imposed upon the defendant was eight years or less and the offense for which the defendant was sentenced was not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. See id. § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. See id. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See id. If the court determines that a period of probation is appropriate, it shall sentence the defendant to a specific sentence but then suspend that sentence and place the defendant on supervised or unsupervised probation either immediately or after the service of a period of confinement. See Tenn. Code Ann. §§ 40-35-303(c), -306(a).

The Defendant's long history of criminal conduct, along with the failure of prior measures less restrictive than confinement, amply support the trial court's denial of an alternative sentence in this case.

#### ***D. Waiver of Fines***

Finally, the Defendant alleges that the trial court erred by failing to waive all or part of his fines. The trial court imposed the fines recommended by the jury of \$3000 for the violation of the habitual traffic offender order and \$3500 for the reckless aggravated assault. The court explained its reasoning as follows:

To the [c]ourt those fines show how strong this jury felt about their verdict in this case. . . . [The fine for violation of the habitual traffic offender order is the maximum fine.] The [reckless aggravated assault conviction receives a] \$3500 fine. That's \$1500.00 less than the maximum and I find that's an appropriate fine. He had property, he had a motor vehicle, whatever. Disability, one person's disability is another person's, just aggravation. So I find you're capable of working at something. So you need to—you have to pay those fines.

The Defendant now asserts that he is indigent "under the criteria set forth in [Tennessee Code Annotated] § 40-14-202(b)." The Defendant also states that the trial court should have waived his fines, including the mandatory minimum fine, under Tennessee Code Annotated sections 55-10-403(b) and 40-24-102. The State responds that the statute prescribing the requirements for indigency under Tennessee Code Annotated section 40-14-202(b) only apply to the appointment of counsel,

not the waiving of fines. The State further asserts that the trial court was within its discretion to determine whether the fines were appropriate in the Defendant's circumstances. We agree with the State.

While the trial court had the statutory discretion to waive all or part of the fines recommended by the jury, the Defendant bears the burden of demonstrating how the fines are improper. The jury decided that the Defendant's conduct warranted these fines, and the trial court found that "those fines show how strong this jury felt about their verdict in this case." The trial court also found the fines to be appropriate given the facts and circumstances of the case.

### **Conclusion**

Based upon the foregoing reasoning and authorities, we affirm the judgments of the trial court.

---

DAVID H. WELLES, JUDGE